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Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1433

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GLORIA RICHARDSON

Petitioner,

v.

CLARISSA MARSH

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

STATE APPELLATE DEFENDER OFFICE

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Applicant to Supreme Court Bar
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MOTION FOR LEAVE TO PROCEED
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The Respondent, CLARISSA MARSH, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 46.

Respondent states as follows in support of this motion:

1. The United States District Court for the Eastern District of Michigan granted Respondent leave to proceed in forma pauperis on July 6, 1983.

2. On November 19, 1984, the District Court denied a certificate of probable cause, but granted Respondent leave to proceed in forma pauperis on appeal.

3. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit appointed counsel to represent Respondent, pursuant to the Criminal Justice Act of 1964, as amended.

4. In view of the foregoing, Respondent has not filed an affidavit with this motion. Supreme Court Rule 46.1; 18 U.S.C. § 3006(A)(d)(6).

WHEREFORE, Respondent asks this Honorable Court for leave to proceed in forma pauperis.

Respectfully submitted,

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Dated: March 21, 1986

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GLORIA RICHARDSON

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v.

CLARISSA MARSH

Respondent.

PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that a copy of Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari and Appearance has been served on:

Frank J. Kelley, Attorney General
525 W. Ottawa
760 Law Bldg.
Lansing, Michigan 48913

Wayne County Prosecutor
1441 St. Antoine
Detroit, Michigan 48226

by placing said documents in a properly addressed envelope with postage prepaid and placing said envelope in the United States mail box located at the State of Michgan Plaza, on this 21st day of March, 1986.

Kathy Myles

Kathy Myles

Subscribed and sworn to before
me this 21st day of March, 1986.

Joanne M. Morandini

Notary Public, Wayne County, Mich.
My commission expires: May 3, 1988

NO. 85-1433

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OCTOBER TERM, 1986

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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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Dated: March 21, 1986

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

THE SIXTH CIRCUIT'S HOLDING THAT RESPONDENT WAS DENIED HER RIGHT OF CONFRONTATION BY THE ADMISSION OF A NONTESTIFYING CODEFENDANT'S STATEMENT AT THEIR JOINT TRIAL WAS BASED ON THE CORRECT APPLICATION OF BRUTON V. UNITED STATES TO THE FACTS OF THIS CASE, AND ANY CONFLICTS WITH OTHER FEDERAL CIRCUITS ARE BASED ON FACTUAL, NOT LEGAL DIFFERENCES.

COUNTERSTATEMENT OF THE CASE

For purposes of this brief, Respondent accepts the Statement of the Case in Petitioner's petition for writ of certiorari, and relies as well on the facts set forth in the opinion of the Sixth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT'S HOLDING THAT RESPONDENT WAS DENIED HER RIGHT OF CONFRONTATION BY THE ADMISSION OF A NONTESTIFYING CODEFENDANT'S STATEMENT AT THEIR JOINT TRIAL WAS BASED ON THE CORRECT APPLICATION OF BRUTON V UNITED STATES TO THE FACTS OF THIS CASE, AND ANY CONFLICTS WITH OTHER FEDERAL CIRCUITS ARE BASED ON FACTUAL, NOT LEGAL DIFFERENCES.

The Sixth Circuit Court of Appeals in this case ordered that Respondent Clarissa Marsh be granted a writ of habeas corpus because of the admission at trial of a codefendant's statement, which, although references to Respondent were removed, nevertheless added substantial, perhaps critical weight to the prosecutor's case in a form not subject to cross-examination. Bruton v. United States, 291 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968). The Sixth Circuit found that under the facts of this case, the erroneous admission of codefendant Williams' statement was not harmless beyond a reasonable doubt:

> "Under the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless." (Slip Opinion, p. 25)(emphasis added).

Briefly, the pertinent facts are as follows:[1/] Respondent Marsh and her codefendant, Benjamin Williams, were each charged with two counts of first-degree felony murder[2/] and one count of assault with intent to murder[3/] arising out of a shooting alleged to have occurred during the course of a robbery in a house in Detroit, Michigan. Respondent Marsh was present in the house during the robbery, but was not present when Williams and a subsequently tried defendant, Kareem Martin, took the victims into the basement to shoot them.

Respondent Marsh was tried under an aiding and abetting theory. Under Michigan law, her intent was a critical element of the charged offenses,[4/] and a major theme of the prosecutor's case was that the defendants had articulated a preconceived plan to "take out," or kill the robbery victims. The prosecutor

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1/ The facts cited in this brief are those referred to in the Sixth Circuit's opinion.

2/ Mich. Comp. Laws Ann. § 750.316.

3/ Mich. Comp. Laws Ann. § 750.83.

4/ Marsh v. Richardson, slip opinion, p. 23, fn.10.

argued that they had discussed this plan in a car on the way to the house where the robbery occurred.

The only direct evidence of this preformulated plan was codefendant Williams' prior statement to the police.[5/] Williams himself did not testify. While references to Respondent Marsh were deleted, her own exculpatory testimony placed her in the car with Williams and Martin at the time they allegedly discussed the plan. Clarissa Marsh testified that she heard no discussion about robbing or killing anyone at this time, and denied seeing Martin produce a gun.[6/]

The Petitioner seeks a writ of certiorari, framing the issue as whether the rule of Bruton v. United States, supra, applies when the redacted statement of a codefendant incriminates a defendant only when viewed in the context of other, admissible evidence. Claiming there is a split among the federal circuits, Petitioner cites footnote nine of the Sixth Circuit's opinion in support of the petition.

Petitioner misconstrues the true nature of the Sixth Circuit's opinion in this case, as well as footnote nine. The critical questions under Bruton are whether, under the facts of a particular case, a codefendant's statement is "powerfully incriminating" or whether it adds "substantial, perhaps even critical weight to the government's case in a form not subject to cross-examination", and whether there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining (defendant's) guilt." 391 U.S. 123, 126-128. Within the context of those general rules, each case is of course judged according to its own peculiar facts, and while the absence of a direct reference to the defendant is a factor to be considered, it is not necessarily the decisive factor. Under the facts of the present case, the Sixth Circuit correctly found the codefendant's statement to be powerfully incriminating as to the respondent.

An examination of the cases cited in footnote nine shows that there is no

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5/ The redacted version of Williams' statement is at pp. 3-4 of the Sixth Circuit's slip opinion in this case.

6/ The Sixth Circuit in this case recognized that since Marsh's own testimony was exculpatory, the "interlocking confession" rule of Parker v. Randolph, 442 U.S. 62; 60 L.Ed.2d 713; 99 S.Ct. 2132 (1979), does not apply. Marsh v. Richardson, slip opinion, p. 12, fn. 5.

fundamental split as to the appropriate standard to apply in a Bruton analysis. The cases differ in the facts, not in the law.

For example, in United States v. DiGregorio, 605 F.2d 1184 (1st Cir., 1979), cert denied 444 U.S. 937; 100 S.Ct. 287; 62 L.Ed. 2d 197 (1979), the court considered the fact that the extrajudicial statement in question did not identify the defendant on its face. However, the court also noted that "there was substantial evidence independent of the extrajudicial statement to link Delvecchio to the conspiracy." 605 F.2d at 1190.

In United States v. Wilkinson, 754 F.2d 1427 (2d Cir, 1985), the Second Circuit rejected the defendant's Bruton argument where the extrajudicial statement, without additional independent evidence, did not link the defendant to the crime. However, the court also held that because of other substantial evidence of defendant's guilt, the statement was not powerfully incriminating:

> "Nor was the statement, in view of the wiretap evidence connecting Burch with the conspiracy, "a vitally important" part of the government's case against Burch, which is essential to a successful invocation of Bruton. United States v. Wingate, 520 F2d 309, 313 (2d Cir. 1975), cert denied, 423 US 1074, 96 SCt 858, 47 L.Ed.2d 84 (1976)." 754 F. 2d at 1435.

Had the Wilkinson court been faced with a situation such as the present case, where there was, apart from the codefendant's statement, only the most anemic circumstantial evidence on an element of the offense, they might well have reached a different result.

In fact, the Second Circuit, in United States ex rel. LaBelle v. Mancusi, 404 F.2d 690 (2d Cir., 1968), explicitly used "evidentiary linkage" to find Bruton error in a redacted statement which in no way inculpated the defendant on its face. The defendant and his brother were tried jointly for rape and murder. The brother, who did not testify, made a statement to the police which implicated the defendant in the crimes. All references to the defendant were removed, and the edited statement was read to the jury. The Court reversed the conviction based on the fact that independent evidence linked the defendant to the statement:

> "Thus the explicit reference to Eddie striking the death blow had been excised. But it was clear to the jury from the rest of the confession, and from the other evidence introduced at trial, that Richard and Eddie had been alone in their car with the Snay girl just before the death blow was struck. Thus the jurors had to conclude from the redacted confession that either Eddie or Richard, or both, committed the murder. The

> inculpatory nature of the confession as applied to Edward is not fairly subject to dispute." 404 F.2d at 692 (emphasis added).

In United States v. Hicks, 524 F.2d 1001 (5th Cir., 1975), the Fifth Circuit found no Bruton violation where the defendant's name was redacted from his codefendant's statement. While Hicks contains language intimating that an extrajudicial statement must directly implicate a defendant to come within the Bruton rule, the ultimate holding was based on the fact that the statement was simply not powerfully incriminating.

Significantly, the Fifth Circuit in Hicks relied on the Seventh Circuit's opinion in United States v. English, 501 F.2d 1254 (7th Cir., 1974), cert denied, Hubbard v. United States, 419 U.S. 1114; 95 S.Ct. 791; 42 L.Ed.2d 811 (1975). English noted Bruton's suggestion that redaction might in some cases cure the problem, but did not adopt a per se rule that a statement must be inculpatory on its face to come under Bruton. The Seventh Circuit has found Bruton error in cases where the challenged statement, standing alone, did not inculpate the defendant. See United States v. DeStefano, 476 F.2d 324 (7th Cir., 1973).

The Ninth Circuit in United States v. Tavelman, 650 F.2d 1133 (9th Cir., 1981), found no Bruton error where the codefendant's admission contained only a "vague reference" from which defendant's guilt could be inferred. 650 F.2d at 1139. The court found any Bruton error to be harmless in light of "the overwhelming admissible evidence that also tied the defendants to one another." Id.

Footnote nine of the Sixth Circuit's opinion in the present case also cites Serio v. United States, 401 F.2d 989 (D.C. Cir., 1968). However, the Serio court found Bruton error in a redacted statement which implicated the defendant only through linkage with other evidence:

> "Accordingly, under the principles of Bruton, the instruction to disregard the confession in considering Serio's case would not have avoided prejudicial error, due to the lack of opportunity to cross-examine LaShine coupled with the well-nigh inevitable association of Serio as the 'other man' referred to in LaShine's confession." Bruton v. United States, supra. 401 F.2d at 990.

The important point is that the question of whether a defendant has been denied the right of confrontation under Bruton v. United States, supra, and whether that denial is harmless beyond a reasonable doubt under Harrington v. California, 395 U.S. 250; 23 L.Ed.2d 284; 89 S.Ct. 1726 (1969), can only be determined in a case-by-case examination of all the facts and circumstances.

As the Sixth Circuit pointed out, the somewhat unusual facts of the case at bar support a particularly compelling argument for finding a Burton error which could not possibly be considered harmless:

> "The prosecution, however, in closing argument, questioned Marsh's testimony that she heard no discussion of the planned robbery and suggested that, in fact, the robbery had been discussed in the car. Especially pertinent in this case is (1) that the prosecution in closing argument pointed out the impermissible linkage to the jury, (2) that the killings were discussed in the car, providing evidence of Marsh's knowledge of a plan encompassing murder, and (3) that intent or malice is a critical element of both offenses under Michigan law." Slip Opinion, p.23

* * *

> "Under the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless. The statement was not merely cumulative nor was the independent evidence of guilt overwhelming. The linkage relied on by the State between Marsh's admission that she accompanied Williams and Martin to the murder scene and Williams' statement that the possibility of killing the victims was discussed in the car, contributed the most direct evidence of malice or intent on Marsh's part. The other evidence in the case was circumstantial and, although probative and perhaps persuasive, under the circumstances and in light of the elements of the offenses charged, we cannot say that introduction of Williams' statement did not render the State's case significantly more persuasive." Slip Opinion, p. 25-26.

The Sixth Circuit's opinion is in conformity with this Court's holdings in Bruton v. United States, supra, and Harrington v. California, supra, and does not significantly conflict with other federal circuits in its legal analysis. Any conflicts with the holdings of other circuits revolve around the facts, not the law.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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